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5 UNITED STATES DISTRICT COURT
6 EASTERN DISTRICT OF WASHINGTON

7 RUSSELL JD SMITH,

8 Plaintiff,

9 v.

10 KITTITAS COUNTY VETERANS
11 COALITION; KITTITAS COUNTY
12 BOARD OF COUNTY
13 COMMISSIONERS; VETERANS
14 ADVISORY BOARD; JERRY
15 PETTIT, Kittitas County Auditor;
16 PAUL JEWELL; OBIE O'BRIEN;
BILLY ROBBINS; CHAD LARSON;
RONALD NESS; BRENT PAINE;
JOSEPH PEACH; MEL GOUDGE;
and WERNER HILLEMANN,

Defendants.

NO: 1:16-CV-3140-RMP

ORDER GRANTING DEFENDANTS'
MOTION FOR SUMMARY
JUDGMENT

17 BEFORE THE COURT is a Motion for Summary Judgment, ECF No. 36,
18 by Defendants Kittitas County Board of County Commissioners, Veterans'
19 Advisory Board, Jerry Pettit, Paul Jewell, Obie O'Brien, Chad Larson, Ronald
20 Ness, Brent Paine, Joseph Peach, and Mel Goudge's (collectively, "County
21 Defendants"). Defendants Kittitas County Veterans Coalition, Billy Robbins, and

ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY
JUDGMENT ~ 1

1 Werner Hillemann (collectively, “KCVC Defendants”) join the County Defendants
2 in the Motion for Summary Judgment. ECF No. 40. The Court has reviewed the
3 pleadings, including Plaintiff’s Response to Defendants’ Summary Judgment, ECF
4 No. 42, and is fully informed.

5 **BACKGROUND**

6 Plaintiff Russell Smith, appearing *pro se*, filed suit against the County
7 Defendants and KCVC Defendants. ECF No. 1-1. In his amended complaint,
8 ordered by this Court, Mr. Smith raises two claims. ECF No. 30 at 3. Mr. Smith
9 alleges violations of Mr. Smith’s rights under § 504 of Title II of the Americans
10 with Disabilities Act of 1990.¹ *Id.* Mr. Smith also alleges a violation of RCW
11 11.94.043. *Id.* Mr. Smith alleges that Defendants violated his civil rights, but he
12 did not assert a 42 U.S.C. § 1983 claim in his amended complaint. The Court
13 considers Mr. Smith’s civil rights claim abandoned, but will still analyze a § 1983
14 claim as though it had been pleaded in Mr. Smith’s amended complaint.

15 This Court has federal question jurisdiction over Mr. Smith’s Americans
16 with Disabilities Act and Rehabilitation Act claim and any 42 U.S.C. § 1983

17
18 ¹ Mr. Smith appears to conflate two laws in his discrimination claim, the ADA and
19 the Rehabilitation Act. “Title II of the ADA was expressly modeled after § 504 of
20 the Rehabilitation Act.” *Duvall v. County of Kitsap*, 206 F.3d 1124, 1135 (9th Cir.
21 2001). However, Title II of the ADA and § 504 of the Rehabilitation Act “create
the same rights and obligations.” *Wong v. Regents of the Univ. of Cal.*, 410 F.3d
1052, 1055 n.1 (9th Cir. 2005). Therefore, the Court will consider Mr. Smith’s
discrimination claim under both Acts.

1 claims pursuant to 28 U.S.C. § 1331. The Court has supplemental jurisdiction over
2 Mr. Smith's Washington State law claim pursuant to 28 U.S.C. § 1367.

3 Mr. Smith alleges that acts by Defendant Werner Hillemann and by KCVC
4 resulted from decisions made by all Defendants. ECF No. 30 at 3-4. Mr. Smith
5 further alleges that, as a result of Defendants' actions, Mr. Smith has suffered
6 emotional and physical damages in the amount of \$3.5 million. *Id.*

7 The County Defendants, joined by KCVC Defendants, seek dismissal with
8 prejudice as to all of Mr. Smith's claims. ECF Nos. 36 & 40. Defendants argue
9 that Mr. Smith has failed to provide evidence that any of the County Defendants
10 were involved in the incidents related to Mr. Smith's claims and that Mr. Smith has
11 failed to establish facts necessary to support his prima facie case for each of his
12 claims. ECF No. 36.

13 As a preliminary matter, this Court explained to Mr. Smith that he would
14 need to comply with the rules of civil procedure while prosecuting his lawsuit in
15 this court. ECF No. 30 at 2. In addition, Defendants provided Mr. Smith with a
16 notice regarding the summary judgment rule requirements for *pro se* litigants,
17 which states that a party responding to a motion for summary judgment must file a
18 responsive memorandum as well as a statement of the specific facts which
19 establish a genuine issue of material fact precluding summary judgment. ECF No.
20 41.

1 Although Mr. Smith responded to Defendants’ motion for summary
2 judgment with a responsive memorandum, Mr. Smith did not provide the required
3 statement of facts or supporting evidence. *See* ECF No. 42. Mr. Smith asserts in
4 his responsive memorandum that he will show how each of his allegations is
5 supported by evidence and depositions, as well as how all Defendants are culpable,
6 but Mr. Smith did not proffer specific facts or provide evidence to support his
7 assertions and arguments. *See id.*

8 **DISCUSSION**

9 ***Legal Standard for Summary Judgment***

10 A court may grant summary judgment where “there is no genuine dispute as
11 to any material fact” of a party’s prima facie case, and the moving party is entitled to
12 judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-33 (1986);
13 *see also* FED. R. CIV. P. 56(c). A genuine issue of material fact exists if sufficient
14 evidence supports the claimed factual dispute, requiring “a jury or judge to resolve
15 the parties’ differing version of the truth at trial.” *T.W. Elec. Serv., Inc. v. Pac. Elec.*
16 *Contractors Ass’n*, 809 F.2d 626, 630 (9th Cir. 1987). “A key purpose of summary
17 judgment ‘is to isolate and dispose of factually unsupported claims.’” *Id.* (citing
18 *Celotex*, 477 U.S. at 324).

19 The moving party bears the burden of showing the absence of a genuine
20 issue of material fact, or in the alternative, the moving party may discharge this
21 burden by showing that there is an absence of evidence. *See Celotex*, 477 U.S. at

1 325. The burden then shifts to the nonmoving party to set forth specific facts
2 showing a genuine issue for trial. *See id.* at 324. The nonmoving party “may not
3 rest on mere allegations, but must by [its] own affidavits, or by the depositions,
4 answers to interrogatories, and admissions on file, designate specific facts showing
5 that there is a genuine issue for trial.” *Id.* The Court will not infer evidence that
6 does not exist in the record. *See Lujan v. National Wildlife Federation*, 497 U.S.
7 871, 888-89 (1990) (court will not presume missing facts). The Court will “view
8 the evidence in the light most favorable” to the nonmoving party. *Newmaker v.*
9 *City of Fortuna*, 842 F.3d 1108, 1111 (9th Cir. 2016). The evidence of the non-
10 movant is to be believed, and all justifiable inferences are to be drawn in his
11 favor.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

12 ***ADA or Rehabilitation Act Claim***

13 Defendants argue that Mr. Smith cannot establish a prima facie case under
14 Title II of the ADA, or under § 504 of the Rehabilitation Act. ECF No. 36 at 12.
15 Mr. Smith alleges that Defendants discriminated against him in violation of Title II
16 of the ADA and § 504 of the Rehabilitation Act when Defendant Werner
17 Hillemann allegedly prevented Mr. Smith from entering the KCVC offices and
18 completing and submitting an application for assistance on March 2, 2016. ECF
19 No. 30 at 3.

20 Title II of the ADA and § 504 of the Rehabilitation Act (collectively, “the
21 Acts”) “create the same rights and obligations.” *Wong v. Regents of the Univ. of*

1 *California*, 410 F.3d 1052, 1055 n.1 (9th Cir. 2005). To prove discrimination in
2 violation of the Acts, the plaintiff must show: 1) that he is disabled within the
3 meaning of the Acts; 2) that he was discriminated against by a public entity; and
4 that the discrimination was “by reason of” his or her disability. *See* 42 U.S.C. §
5 12132; 29 U.S.C. § 794; *see also Duvall v. County of Kitsap*, 206 F.3d 1124, 1135
6 (9th Cir. 2001).

7 In support of his disability discrimination claim, Mr. Smith asserts that he is
8 a disabled combat veteran, suffering from cyclothymia and post-traumatic stress
9 disorder (PTSD). ECF No. 1-1 at 6. To prove that he is disabled within the
10 meaning of the ADA, Mr. Smith must show that he has: 1) “a physical or mental
11 impairment that substantially limits one or more of [his] major life activities”; 2) “a
12 record of such an impairment”; or 3) been “regarded as having such an
13 impairment.” 42 U.S.C. § 12102(2). A Department of Veterans Affairs rating
14 decision found that Mr. Smith had hearing loss in his left ear but determined that
15 Mr. Smith was entitled to 0% compensation. ECF No. 39-3 at 4. It also concluded
16 that Mr. Smith had hearing loss in his right ear and a “mood disorder and
17 personality disorder.” *Id.* However, Mr. Smith has failed to provide any evidence
18 that these ailments substantially limit one or more of Mr. Smith’s major life
19 activities in some way.

20 Mr. Smith also must show that he was discriminated against by a “public
21 entity,” which, as defined by the ADA, includes any State or local government, or

1 any department, agency, or other instrumentality of a State or local government.
2 42 U.S.C. § 12131. Defendants in their individual capacities are not subject to
3 liability under the Acts. *See Daniel v. Levin*, 172 Fed.Appx. 147, 149 (9th Cir.
4 2006). Defendants argue that Mr. Smith’s claim under the Acts at most implicates
5 only KCVC. ECF No. 36 at 3. Because it is an independent, non-profit
6 corporation, distinct from Kittitas County, and Kittitas County does not direct,
7 control, or manage the day-to-day operations of Defendant KCVC, Defendant
8 KCVC is not a “public entity” under the Acts. *See* ECF No. 36, ¶ 4. In his
9 response, Mr. Smith asserts without support that there was a “chain of command”
10 linking the public County Defendants and the private KCVC Defendants. ECF No.
11 42 at 2.

12 Even if the Court assumes that Mr. Smith is disabled within the meaning of
13 the Acts, which the Court does not, and if the Court assumes that KCVC is a
14 “public entity” under the Acts, which the Court does not, Mr. Smith also must
15 show that Defendants discriminated against him by reason of his disability.

16 Mr. Smith has failed to provide any argument or evidence to support his
17 claim that Defendants acted in response to his alleged disabilities. Instead, Mr.
18 Smith stated that Defendant Hillemann called Mr. Smith a “troublemaker,” “a
19 liar,” and “a piece of shit.” ECF No. 39-11 at 33. Mr. Smith characterized the
20 interaction with Defendant Hillemann as “that classic confrontation between an
21 enlisted person and lifer. I ain’t [sic] a lifer.” *Id.* These statements indicate that

1 the conflict between Mr. Smith and Defendant Hillemann was of a personal nature,
2 not based on Mr. Smith's disabilities.

3 Defendants assert that the 2016 altercation between Mr. Smith and
4 Defendant Hillemann was the result of a prior incident in which Mr. Smith and a
5 friend were involved in a verbal altercation with a KCVC representative. *Id.* at 14.
6 Defendants also argue that because Mr. Smith did not actually complete or submit
7 an application for benefits through KCVC in 2016, the KCVC Defendants did not
8 deny Mr. Smith any benefits, and therefore, could not have discriminated against
9 him. *Id.* at 13-14. In Mr. Smith's response, he does not address Defendants'
10 arguments or provide any arguments that support his claim that Defendant
11 Hillemann's conduct was discriminatory in response to Mr. Smith's alleged
12 disabilities. *See* ECF 42.

13 Therefore, even if the Court considers Mr. Smith's evidence in the light
14 most favorable to him, the Court finds that Mr. Smith has not presented evidence
15 sufficient to sustain a genuine issue of material fact as to any of the prima facie
16 elements of his discrimination claim under Title II of the ADA or § 504 of the
17 Rehabilitation Act. The Court finds that summary judgment is proper and
18 dismisses with prejudice Mr. Smith's discrimination claims under the Acts.

19 ***Power of Attorney Revocation Claim***

20 Mr. Smith alleges that Defendant KCVC revoked Mr. Smith's power of
21 attorney, without his permission or knowledge, and without providing the express

1 notice to Mr. Smith as required under RCW 11.94.043. ECF No. 30 at 3. Mr.
2 Smith alleges that this revocation damaged him, because it delayed the application
3 he had submitted to the Department of Veterans Affairs. ECF No. 1-1 at 7-8.

4 Defendants assert that Mr. Smith has not established that a genuine issue of
5 material fact exists as to whether the KCVC Defendants violated RCW 11.94.043
6 by terminating Mr. Smith's power of attorney without his permission. ECF No. 36
7 at 14-16. RCW 11.94.043 was repealed effective January 1, 2017. While it was in
8 effect, the statute provided that: a durable power of attorney "shall continue in
9 effect until revoked or terminated by the principal, by a court-appointed guardian,
10 or by court order."

11 Mr. Smith alleges that, in 2012, the KCVC Defendants improperly revoked a
12 power of attorney in violation of RCW 11.94.043, which negatively affected an
13 application that Mr. Smith had submitted to the Department of Veterans' Affairs
14 (VA). ECF No. 30 at 3; ECF No. 1-1 at 7-8. Mr. Smith asserts that the VA acted
15 upon KCVC Defendants' notice of revocation by stopping Mr. Smith's VA
16 Application. ECF No. 1-1 at 7-8. Mr. Smith has not provided evidence to support
17 his claim that the KCVC Defendants took any action to revoke a power of attorney
18 in 2012. However, Defendants provided evidence that the KCVC Defendants sent
19 a memorandum to the VA in February of 2014, not 2012, stating that it was
20 rescinding "our P.O.A. to Russell Smith." ECF No. 39-8 at 2-3. Mr. Smith has not
21 addressed the discrepancy between the year he alleges that the KCVC Defendants

1 revoked Mr. Smith's power of attorney and the year that the KCVC Defendants
2 sent the memorandum rescinding the P.O.A. The Court will not infer evidence that
3 does not exist in the record, and Mr. Smith has not responded to Defendants'
4 proffered evidence.

5 Defendants also argue that Mr. Smith has provided no evidence that he ever
6 appointed KCVC Defendants as his power of attorney; that the VA took any action
7 on Mr. Smith's VA application in response to KCVC's 2014 memorandum; or that
8 the KCVC Defendants' memorandum had any legal effect. ECF No. 36 at 14-15.
9 In addition, Defendants contend that Mr. Smith has not alleged, and that RCW
10 11.94.043 does not provide, a cause of action for money damages. Mr. Smith did
11 not respond to Defendants' arguments and assertions. *See* ECF No. 42.

12 The evidence in the record shows that Mr. Smith appointed the Vietnam
13 Veterans of America-70 as his representative in March 2010. ECF No. 39-2 at 2.
14 The VA issued a report in 2016 that indicates that it recognized the Vietnam
15 Veterans of America as Mr. Smith's power of attorney as of February 4, 2016.
16 ECF No. 39-9. There is no evidence regarding Mr. Smith's ever appointing the
17 KCVC Defendants as his representative.

18 The Court finds that Mr. Smith has not presented evidence sufficient to
19 create a genuine issue of material fact as to his RCW 11.94.043 power of attorney
20 claim or to support his prima facie case. The Court finds that summary judgment
21 is proper and dismisses with prejudice Mr. Smith's power of attorney claim.

1 **42 U.S.C. § 1983 Claim**

2 Although the Court considers Mr. Smith to have abandoned his § 1983
3 claim, the Court still will analyze the claim as though it had been pleaded in the
4 amended complaint. To satisfy the legal standard required by 42 U.S.C. § 1983, a
5 plaintiff must prove two essential elements. *See Parratt v. Taylor*, 451 U.S. 527,
6 535 (1981), *overturned on other grounds by Daniels v. Williams*, 474 U.S. 327
7 (1986). First, the conduct complained of must be “committed by a person acting
8 under color of state law.” *Id.* Second, the plaintiff must show that the conduct
9 complained of deprived the plaintiff of some right, privilege, or immunity secured
10 by the Constitution or federal statutory law. *See id.*

11 Section 1983 “contains no state-of-mind requirement independent of that
12 necessary to state a violation of the underlying constitutional right.” *Daniels v.*
13 *Williams*, 106 S. Ct. 662, 664 (1986). In a § 1983 suit, “the plaintiff must still prove
14 a violation of the underlying constitutional right.” *Id.*

15 Defendants argue that Mr. Smith has not provided any evidence to support a
16 civil rights claim under § 1983. ECF No. 36 at 6-12. In his response to
17 Defendants’ Motion for Summary Judgment, Mr. Smith asserts that Defendants
18 interfered with Mr. Smith’s life, liberty, and pursuit of happiness, but he provides
19 no evidence to support this assertion. ECF No. 42 at 2. Mr. Smith does not
20 identify a specific right which Defendants allegedly deprived. Mr. Smith also fails
21 to identify the manner in which Defendants allegedly deprived him of that right.

1 In order to prove a § 1983 claim, Mr. Smith also must prove that an actor
2 acting “under color of state law” undertook the complained-of conduct against
3 him. A private actor may act “under color of state law” when its challenged
4 conduct constitutes “state action.” *Lugar v. Edmondson Oil Co.*, 457 U.S. 922,
5 935 (1982). “A challenged activity may be state action when it results from the
6 State’s exercise of ‘coercive power,’ when the State provides ‘significant
7 encouragement, either overt or covert,’ or when a private actor operates as a
8 ‘willful participant in joint activity with the State or its agents.’” *Brentwood Acad.*
9 *v. Tenn. Secondary Sch. Ath. Ass’n*, 531 U.S. 288, 296 (2001) (internal citations
10 omitted).

11 Mr. Smith complains that the KCVC Defendants harmed him by preventing
12 him from completing and submitting an application to KCVC in 2016 and by
13 revoking a power of attorney without his knowledge. ECF No. 30 at 3. Defendant
14 KCVC is an independent, non-profit corporation, distinct from Kittitas County.
15 ECF No. 37, ¶ 8. Mr. Smith appears to argue that because Defendant KCVC had
16 entered into an agreement with Kittitas County to implement a voucher system that
17 utilized the Kittitas County veterans’ relief fund, the KCVC Defendants were
18 acting in concert with state actors. ECF No. 42. Mr. Smith does not bring any §
19 1983 allegations in his Complaint against the County Defendants. However, Mr.
20 Smith asserts that there was a “chain of command” linking the County Defendants
21 and the KCVC Defendants. ECF No. 42 at 2.

1 To support his argument, Mr. Smith submits what appear to be excerpts
2 from RCW 73.08.035, RCW 73.08.080, and the agenda from an April 21, 2015,
3 Board of County Commissioners of Kittitas County meeting. *Id.* at 2-4. These
4 exhibits relate to the County Defendants' involvement with Kittitas County's
5 veterans' relief fund, but do not demonstrate that the KCVC Defendants were
6 operating "under color of state law" when Defendant Hillemann acted in an
7 allegedly aggressive manner towards Mr. Smith in 2016 or when the KCVC
8 Defendants sent the 2014 memorandum to the VA revoking a power of attorney
9 that Mr. Smith had allegedly granted. Defendants state that KCVC is an
10 independent, non-profit corporation, distinct from Kittitas County, and that Kittitas
11 County does not direct, control, or manage the day-to-day operations of KCVC.
12 ECF No. 37, ¶ 8.

13 The County Defendants additionally argue that the County Defendants
14 cannot be held liable under § 1983 for actions of the County's employees. ECF
15 No. 36 at 4. A municipality cannot be held liable under § 1983 for the actions of
16 its employees under the theory of *respondeat superior*." *Jones v. Keitz*, 2017 U.S.
17 Dist. LEXIS 58452, at *12 (E.D. Cal. Apr. 17, 2017) (citing *Monell v. Dep't of*
18 *Soc. Servs.*, 436 U.S. 658, 691 (1978)). Instead, to state a claim against a public
19 entity under *Monell*, a plaintiff must show: "(1) that the plaintiff possessed a
20 constitutional right of which she was deprived; (2) that the municipality had a
21 policy; (3) that this policy amounts to deliberate indifference to the plaintiff's

1 constitutional right; and, (4) that the policy is the moving force behind the
2 constitutional violation." *Dougherty v. City of Covina*, 654 F.3d 892, 900 (9th Cir.
3 2011). Mr. Smith has not alleged any of these elements, or provided any support
4 for these elements, and thus fails to establish any liability of the County
5 Defendants under § 1983.

6 The Court finds that Mr. Smith has not expressly asserted a § 1983 claim.
7 Even if he had brought a claim under § 1983, Mr. Smith has not presented
8 evidence sufficient to create a genuine issue of material fact necessary or support
9 the prima facie case for a § 1983 claim. Therefore, the Court finds that summary
10 judgment is proper and dismisses with prejudice Mr. Smith's civil rights claims
11 brought against Defendants.

12 Finally, Mr. Smith stated in his response to the Motion for Summary
13 Judgment, "Plaintiff has no objection to the Summary Judgment." ECF No. 42 at
14 5. The Court recognizes that Mr. Smith is a *pro se* litigant. However, taking this
15 statement into consideration along with the other arguments and evidence
16 presented with the pleadings on Defendants' Motion for Summary Judgment, the
17 Court finds that summary judgment for Defendants is proper.

18 Accordingly, **IT IS HEREBY ORDERED THAT**

19 1. Defendants' Motion for Summary Judgment, **ECF No. 36**, is

20 **GRANTED**, and Mr. Smith's claims are **dismissed with prejudice** as to
21 all Defendants in this matter.

2. All other pending motions are denied as moot.

The District Court Clerk is directed to enter this Order, provide copies to counsel, and **close this case**.

DATED November 20, 2017.

s/ Rosanna Malouf Peterson
 ROSANNA MALOUF PETERSON
 United States District Judge